IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 210.

HOWARD HALL COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellee.

BRIEF OF AMICUS CURIAE

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Regular Common Carrier Conference, of the
American Trucking Association, Inc.

January, 1942.

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BRIEF OF AMICUS CURIAE.

This brief is filed on behalf of the Regular Common Carrier Conference of The American Trucking Associations, Inc., which is a non-profit corporation constituting the national organization of the trucking industry. The Regular Common Carrier Conference is a division of the trucking industry organized primarily to protect and further the interest of the regular route common carriers by motor vehicle. This conference is composed of a large number of regular route common carriers by motor vehicle engaged in the transportation of property. Its members are vitally interested as competing carriers, in the question of statutory construction and its applica-

tion to the Motor Carrier Act as involved in the instant case.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court (R. 43-49) is reported in 38 Federal Supplement 556. The report of the Interstate Commeree Commission (R. 8-14) appears in 24 M.C.C. 273.

JURISDICTION.

The jurisdiction of this Court has been asserted by the appellant under authority of Title 28, Sections 46 and 47, of United States Code, Ann., 36 Stat. 1148, 38 Stat. 32, seeking to set aside and annul the final order of the Interstate Commerce Commission, made under the Motor Carrier Act, 1935, as amended, Title 49, Section 301, etc., 49 Stat. 543.

STATEMENT OF THE CASE.

The appellant, a common carrier by motor vehicle of property, in interstate commerce, asserted presumptive rights to a certificate of public convenience and necessity under the provisions of Section 206a, Motor Carrier Act of 1935, alleging that it was engaged in the transportation of general commodities between all points in the states of Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New York, New Jersey, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnet, and all points in Texas within 200 miles of Henderson, Texas.

The Interstate Commerce Commission assigned the application for hearing and appellant amended the application as originally filed, to eliminate therefrom the states of Wisconsin, Texas, Arkansas, Kansas, and Missouri, and that part of Florida south of Tampa and Lakeland, and that part of Illinois north of Chicago (R. 9).

The Interstate Commerce Commission, on July 10, 1940, by Division 5, served its report and order, in which it found that appellant was, on June 1, 1935, and continuously since that time, had been, in bona fide operation as a common carrier by motor vehicle, of general commodities (with certain exceptions), between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida, on and north of a line consisting of U. S. Highway 92, from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne; (b) of paper and paper products from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee, and from Kingsport, Tennessee, to Birmingham; (c) of nails, pipe, pipe fittings, steel and metal ceiling, from Canton, Ohio, to Birmingham; (d) of cloth from Alabama City, Alabama, to Wheeling, West Virginia; (e) and of matches from Wheeling, West Virginia, to Chattanooga and Birmingham; all over irregular routes; and that by reason of such operation it was entitled to a certificate authorizing the continuance thereof. In all other respects the presumptive right to a certificate as asserted by the appellant was denied. (R. 13, 14.)

The appellant then addressed a petition for further consideration to the entire Commission, which petition was denied on February 3, 1941. (R. 14, 15.)

The appellant then filed its complaint in the District Court for the Northern District of Alabama, Southern Division, seeking to restrain the enforcement of the order of the Interstate Commerce Commission insofar as the Commission's order amounted to a denial of a part of the application, as amended.

The District Court, on April 17, 1941, filed its opinion, dismissing the complaint, and affirming the decision of the Interstate Commerce Commission. (R. 43-49.)

ASSIGNMENTS OF ERROR.

The appellant charges the District Court erred, as a matter of law, in two substantial issues, which may be defined as follows:

(a) In affirming the decision of the Interstate Commerce Commission which limited appellant's operating authority between Birmingham and points and places within 10 miles thereof, on the one hand, to points and places in certain named states, on the other hand.

It is contended by the appellant that the Commission's finding in its final report that the appellant had transported 55 shipments of freight to and from points within 100 miles of Birmingham, Alabama, and points in other states, prior to June 1, 1935, entitled appellant to a certificate of public convenience and necessity that would authorize applicant to continue its operation from the larger area.

(b) That the Court erred in affirming the decision of the Interstate Commerce Commission, which limited appellant's operation to certain designated and specific commodities, between particular points (such as paper and paper products from Birmingham to New Orleans, Louisiana, etc.). It is contended by the appellant that the Commission, having found appellant to be a common carrier, engaged on June 1, 1935, in the transportation of the named specific commodities, imposed a commodity limitation in excess of its jurisdiction and contrary to the provisions of the Motor Carrier Act, 1935, as amended.

STATUTES INVOLVED.

We have appended to this brief, the relevant provisions of the Motor Carrier Act, 1935, as amended, which were in effect on the date of the Commission's order, July 10, 1940. (Infra pp. 29, 30, 31, 32.)

SUMMARY OF ARGUMENT.

I. The District Court correctly interpreted the "grandfather" clause (Section 206(a)) provisions of the Motor Carrier Act, 1935, in approving the Commission's finding that the appellant, was on June 1, 1935, engaged in a *bona fide* operation between Birmingham and points and places within 10 miles thereof, on the one hand, and on the other hand, points and places in the territory defined.

II. The District Court correctly interpreted the "grandfather" clause (Section 206(a)) provisions of the Motor Carrier Act, when it approved the action of the Commission, wherein the Commission limited the certifi-

cate of appellant to an operation authorizing the transportation of the specific commodities actually transported between certain designated points; and in approving the policy pursued by the Commission of issuing certificates authorizing the transportation of general commodities throughout wide areas, over irregular routes, only when the evidence indicates a substantial showing of bona fide service.

BRIEF AND ARGUMENT.

Point I.

The appellant contends that it is entitled, upon the findings of fact set out in the report of the Commission, to a certificate authorizing it to conduct a non-radial[1] operation between points, located within a radius of 100 miles of Birmingham (an area of approximately 32,000 square miles), on the one hand, and points and places in the various states awarded, on the other.

However, the Commission in its order of July 10, 1940, limited the operation to points and places within a 10 mile radius of Birmingham despite the fact that in its report it found that the appellant had transported 55 shipments to and from 12 different points (R. 12) located within a 100 mile radius of Birmingham during the 17

[1] Defined by the Commission in Ex Parte No. MC-10 (2 M.C.C. 703), as follows:

"(D) Irregular-route nonradial service.—An irregular-route nonradial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes between points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessity, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation."

months "immunizing" period immediately preceding the "critical" or statutory date of June 1, 1935. (R. 9.)

The action of the Commission in so limiting the operating authority covered in the certificate is said to be arbitrary and in excess of the jurisdiction conferred by the provisions of the Motor Carrier Act, 1935, especially Section 206 (a).

Section 206(a)[2] of the Motor Carrier Act, provides:

> "... that ... if any carrier ... was in bona fide operation on June 1, 1935, ... and has so operated since that time ... the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application is made to the Commission ..."

Section 207[3] provides:

> "... a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application ..."

Section 208[4] provides:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered ... and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate ..."

The appellant in asserting a presumptive claim under the "grandfather clause" proviso of Section 206 (a) alleged a bona fide operation prior to, on, and since the

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[2] Section 206(a) reproduced in full in Appendix, page 30.
[3] Section 207 reproduced in full in Appendix, page 31.
[4] Section 208 reproduced in full in Appendix, page 32.

critical statutory date of June 1, 1935, to, from, and between all points and places in some 25 states. (R. 9, 29-31.)

By amendment at the first hearing, appellant wholly eliminated five states and parts of two other states. (R. 9.)

Appellant's claim to a certificate as finally presented to the Commission involved an operation, in the transportation of general commodities, to, from, and between all points and places in practically all of the states east of the Mississippi, except the New England States. (R. 9.)

As heretofore stated, appellant's present claim is to a certificate authorizing a non-radial operation between points within a radius of 100 miles of Birmingham, on the one hand, and points and places within the States of North and South Carolina, Georgia, Mississippi, and the North half of Florida, on the other hand. (R. 12, 59.)

The Commission, pursuant to Section 206 (a), after two full hearings before the Examiner, briefs by all parties, and exhaustive consideration, found appellant's bona fide operation on June 1, 1935, to be that of a common carrier of general commodities, within the territory defined, and pursuant to Section 207 (a), caused a certificate to issue "authorizing ... part of the operation covered by the application" found to be bona fide and pursuant to the provisions of Section 208 (a) specified in the certificate "the territory within which the motor carrier is authorized to operate."

In so limiting the operations covered by the certificate issued, the Commission followed its early announced and constantly pursued policy of issuing authority to

transport general commodities throughout a wide territory, over irregular routes, pursuant to the "grandfather" clause provisions of the act, to a carrier only when such carrier's right thereto has been proved by substantial evidence of actual service within the claimed area during the immunizing period prior to June 1, 1935.[8]

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[8] Bronstein Contract Carrier Application, 2 M. C.C., 95, 96, 97 (decided June 3, 1937), where the Commission said:

"It is obvious that any certificate or permit issued pursuant to the provisions of Section 206 (a) or 209 (a) must necessarily be predicated upon the motor-carrier operations performed by applicant on the respective statutory dates, and continuously since that time, and that a mere holding out, or an offer, to operate on the specific dates, is not the equivalent of bona fide operation as that term is used in those sections. The burden of proof is upon applicant to establish the character and scope of his operations."

Crescent Transp. Co. Common Carrier Application, 2 M.C.C., 313, 315 (decided July 6, 1937), where the Commission said:

"Any certificate or permit issued pursuant to the provisions of Sections 206(a) or 209(a) must necessarily be predicated upon the motor-carrier operations engaged in by applicants on the respective statutory dates and continuously since that time, and a mere holding out, or offer to operate, on the specified dates, is not the equivalent of bona fide operation, as that term is used in those sections. The burden of proof is upon applicants to establish the character and scope of their operations."

System Arizona Express Service, Inc., Common Carrier Application, 4 M.C.C., 129, 133 (decided Jan. 14, 1938), where the Commission said:

"It would be difficult, if not impossible, to lay down any comprehensive rule as to the showing required to establish a bona fide operation within the act. It seems clear, however, that some consistency of movement must be shown as distinguished from merely a sporadic shipment or two at remote intervals. Beginning with the statutory date, and continuously thereafter, there should be shown some consistency of service, either a regular service or an irregular service of such consistency and continuity as to be undoubted. The frequency and volume required to be shown would depend on what would reasonably be expected of an operator endeavoring to give a good-faith service to a particular place, or over a particular route, having in mind the size, location, and accessibility of the place and the quality of the route."

Powell Bros. Truck Lines, Inc., 9 M.C.C., 785 (decided Oct. 8, 1938), where the Commission said:

"Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence."

In announcing this policy, the Commission has refused to consider the applicant's claim "of holding out to transport," in and of itself, as a substitute for actual service rendered, unless there has been actual operation consistent with claim of an offer to serve.

This policy has received judicial as well as legislative sanction.

In Loving vs. United States, 310 U. S. 609, this court affirmed, per curiam, the decree of the District Court, 32 Federal Supplement 464, which sustained the validity of the Commission's order in Loving Common Carrier Application, 12 M.C.C. 571.

Loving had filed an application, under the "grandfather clause" provisisions of Section 206 (a) seeking a certificate which would authorize the transportation of general commodities to, from and between all points in five states over irregular routes.

The Commission found (12 M.C.C. 571) that the Lovings were, on June 1, 1935, and have been continuously since that time, engaged in bona fide operation as a common carrier by motor vehicle in interstate commerce, over irregular routes, of fruit and vegetables, batteries and battery parts, fiber board boxes, oil in packages, and canned goods, between points in Oklahoma on the one hand, and points in a portion of Colorado on the other.

The carrier then filed a complaint in the District Court, seeking to set aside the Commission's order, contending that a carrier in bona fide operation as a common car-

rier, assumed the obligations of a common carrier, and held himself out as a common carrier, is entitled to a certificate under the "grandfather clause" provisions, authorizing its operation over all routes and within all territories which it assumed to serve, and which it could be compelled to serve. Lovings also contended that the proof of actual operations offered at his hearing before the Commission, justified more extensive operations than those authorized by the certificate issued to it.

The District Court, in dismissing the complaint, disposed of the claim of "holding out to the public" as follows:

> We[a] must, therefore, reject the contentions of plaintiff that the mere ability to serve, as well as the holding out to the public to carry for-hire, is sufficient to satisfy the requirements of the statutes that a carrier must be in bona fide operation on and prior to June 1, 1935. We believe that bona fide operation includes actual operations conducted and carried on by a carrier prior to June 1, 1935, and subsequent thereto, and is not to be limited to actual physical operations conducted on the first day of June, 1935. A mere offer to perform the service, without any actual performance thereof, on and prior to the 'grandfather' date, is not ufficient to authorize the issuance of a certificate of convenience and necessity by the Commission. An occasional service, infrequently performed prior to June 1, 1935, unless such service is seasonal, is insufficient, as there must be a bona fide operation to warrant the issuance of a certificate by the Commission without proof as to

[a] Citing McDonald vs. Thompson, 305 U. S., 263, where this court in considering the expression "in bona fide operation," stated that such an expression "suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated, service."

necessity and convenience to be served by the granting of such authority. The Interstate Commerce Commission has established an administrative practice of granting certificates of convenience and necessity under the 'grandfather' clause, only for such operations as were shown by the evidence to have been actually performed; and has held that the 'grandfather' clause, limits the certificate to the actual commodities transported on and prior to June 1, 1935."

In Eastern Carrier Corp. vs. United States, 31 Fed. Sup. 232, somewhat similar contentions were urged. The District Court stated one of the contentions raised by the plaintiff to be as follows:

"It (plaintiff) also contends that there is nothing in the act which refers to 'sporadic transportation.' It states that all that is required under the terms of the act is that a carrier should have operated by motor vehicle on June 1, 1935, and that it has similarly operated since that time. It contends that what was intended by the 'grandfather' clause was to preserve to the carrier the right to engage in the same sort of carriage which it had engaged in upon the 'grandfather' date and prior thereto, and if the transportation was not a daily transportation, but a seasonal or occasional transportation, the Commission cannot deprive the carrier of his right to conduct such transportation."

In disposing of this contention, the Court said:

"We entertain no doubt that the Commission under the Act has power to restrict the plaintiff to the type of service it was performing on June 1, 1935, *not only as to routes operated*, but also as to the class of commodities which it carries. (Italics ours.)

Inasmuch as the record does not contain the original transcript of the proceedings before the Commission, or the evidence of operation introduced there as exhibits, we must take the facts of operation as reported by the Commission as true. Thus we see, that in the seventeen months of the "immunizing" period prior to the "critical date" of June 1, 1935,[7] the appellant transported 55 shipments[8] to and from 12[9] points, located within a radius of 100 miles of Birmingham.

Appellant cannot sustain its present claim to a certificate authorizing an operation to and from all points in an area of more than 32,000 square miles, upon proof of actual operation, during a seventeen months' period, to only 12 points, involving in all only 55 shipments, unless there is a repudiation of the Commission's policy of denying applications for a certificate covering irregular route operations, involving large areas, unless such operations, and the carrier's right to such a certificate, has been proved by substantial evidence. This policy of the Interstate Commerce Commission, was approved by this court in Loving vs. United States, supra, and should be approved in the instant case.

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[7] "Exhibits purporting to show all shipments in interstate or foreign commerce handled by applicant during the years 1934, 1935, and 1936, were submitted in evidence." (R. 9.)

[8] "Of 1,000 shipments transported prior to June 1, 1935, . . . 55 moved to or from points within 100 miles of Birmingham . . ." (R. 10.)

[9] "The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham." (R. 12.)

As the Commission from the very beginning of its administration of the Motor Carrier Act had adopted this policy,[10] such public and contemporaneous construction should be considered controlling.[11]

We think it is now safe to say this policy of the Commission may now be regarded as having received legislative sanction.

In Loving vs. United States, supra, decided January 24, 1940, the District Court said:

> "It is doubtful that the administrative practice of the Interstate Commerce Commission has been in effect sufficiently long to be conclusive of the question involved."

Since that time Congress has sweepingly amended the Interstate Commerce Act[12] and in so doing reenacted Section 206(a) without any change in its pertinent provisions.

This court has always held that the reenactment by Congress, without change, of a statute which had re-

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[10] See Bronstein Contract Carrier, etc., cited supra, page 9.

[11] "It is sufficient to observe, says the court, that practice, and acquiescense under it, for a period of several years, commencing with the organization of the judicial system, affords and irresistible answer and indeed fixed the construction. It is a contemporary interpretation of the most forceful nature. The practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed. In all cases of ambiguity, the contemporaneous construction, not only of the court but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." Shell's Executor vs. Fauche, 138 U. S. 562, 572; Logan vs. Davis, 233 U. S., 613, 627; United States vs. Sweet, 189 U. S., 471, 473; United States vs. Pugh, 99 U. S. 265, 269.

[12] First amended June 29, 1938, 52 Stat. 1238; Next amended Sept 18, 1940, 54 Stat. 923.

ceived administrative construction, is an adoption by Congress of such construction.[13]

Point II.

The order (R. 13) of the Commission authorized the issuance of a certificate permitting the transportation of specific commodities between designated points[14] (in addition to the grant of general commodities to and from the ten mile radius of Birmingham), and to this limitation of operating right, the appellant assigns error (R. 54, 55).

Appellant contends first, that the common law concept of a common carrier precludes a limitation of commodities, and secondly, that the language of Section 206(a) contains no reference to commodities and the limitation is therefore not authorized under this section.

As a matter of fact, a common carrier, at common law, was under no legal obligation to transport property of a class or kind other than that which it held itself out to carry.

Thus it was said, in the case of *Johnson vs. Midland Railway Co.* (1849) 18 L. J. Ex. 366, 4 Ex. 367, 154 English Reports (Full Reprint) 1254, at page 1257, as follows:

> "So also in the case of a carrier; and that arises from the public profession which he has made. *A per-*

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[13] Komaoa vs. United States, 215 U. S., 392, 396;
United States vs. Falk, 204 U. S., 143, 152;
United States vs. Hermanos, 209 U. S., 337, 339;
Cook vs. United States, 288 U. S., 102, 120.
Koshland vs. Helvering, 298 U. S., 441, 445;
New Haven R. R. vs. Interstate Commerce Commission, 200 U. S., 361, 401, 402.

[14] Paper and paper products from Birmingham to New Orleans, Chattanooga, and Knoxville, and from Kingsport to Birmingham; nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Alabama, to Wheeling, West Virginia; and lathes from Wheeling to Chattanooga and Birmingham.

son may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."[18] (Italics ours.)

Our reported decisions, as well as our text books, follow the maxims laid down by the English courts.

In Elliotts' splendid text on "Railroads," Volume 4, paragraph 2214, it is stated:

"Refusal to carry—Excuses for.—The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject among other limitations and qualifications to the limitation that its obligation extends only to the kind of goods the company undertakes to carry.

Tunnel v. Pettijohn, 2 Harr. (Del.) 48;
Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158;
Kemp v. Coughtry, 11 Johns. (N. Y.) 107;
King v. Lennox, 19 Johns. (N. Y.) 235;
Beckman v. Shoues, 5 Rawls (Pa.) 179, 28 Am. Dec. 653; post, No. 2223. See also Southern Pac. Co. v. State, 19 Ariz. 20, 165 Pac. 303.

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[18] See also the decision in the case of McManus vs. The Lancashire and Yorkshire Rly Co., 157 English Reports (Full Reprint) 865, where at page 869, the court said:

"He may choose the kind of conveyance, the times for transit, the mode of delivery, *the articles that he will profess to carry,* what price he will have, when he shall be paid; and the duty to receive is always limited by his convenience to carry. See Jackson v. Rogers (2 Show. 327), Johnson v. North Midland Railway Company (4 Exch. 367). This right to qualify the duty of receiving, according to terms and conditions fixed by the carrier alone, comprises the right to qualify the common law duty of insuring safety, a duty (337) which has given rise to much discussion, and is now for our consideration." (Italics ours.)

In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried.

Citizens Bank v. Nantucket S. B. Co., 2 Story (U. S.) 16;.

Thus, a railroad company which does not undertake to carry dogs cannot be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggagemaster.

Honeyman v. Oregon & C. R. Co., 13 Ore. 352, 57 Am. Rep. 20,

A farther qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public.

Harp v. Choctaw & C. R. Co., 118 Fed. 169, 173 (quoting text)."

In 13 Corpus Juris (Secondum) page 62 (paragraph 266), it is stated that:

"In the absence of statute to other effect, a common carrier is under no duty to receive and transport property of an extraordinary character.

"U. S.-Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okla., 253 F. 705, 165 C.C.A. 299, and other cases.

"or other than it holds itself out as willing to carry.

"Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238, and other cases."

American Jurisprudence states the rule as follows: (Volume 9. page 432, paragraph 5):

"Status as Affected by Scope or Extent of Business.—Every common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with,

and limited by, his holding out or profession as to the subjects of carriage.

"Annotation: 18 A.L.R. 1316, 1319; 8 B. B. C. 789, 801.

"If he elects to carry freight only, he will be under no obligation to carry passengers, and vice versa. Similarly, if he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed.

"Steele v. McTyer, 31 Ala. 667, 70 Am. Dec. 516, overruled on another point in Boon & Co. v. The Belfast, 40 Ala. 184, 88 Am. Dec. 761; and other cases."

And, in paragraph 290, as follows:

"Generally.—In considering the extent of a carrier's duty to receive and transport, it must be borne in mind that an individual or a corporation becomes a common carrier of just what it offers to carry.

"Therefore, a common carrier of goods is not obliged to accept and carry all personal property of every description that may be offered, but as its duty to the public springs from its offer to the public, its obligation is to carry only according to its public profession adn must necessarily be measured by it.

"Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230;

St. Louis I. M. & S. R. Co. v. Weakly, 50 Ark. 397, 8. S. W. 134, 7 Am. St. Rep. 104;

Pittsburgh, C. & St. L. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682;

Crescent Coal Co. v. Louisville & N. R. Co. 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442;

St. Louis & S. F. R. Co. v. State, 76 Okla. 60, 184 P. 442, 7 A.L.R. 140;

Annotation: 15 L.R.A. 321; 5 L.R.A. (N.S.) 459; 130 A.M. St. Rep. 1071; 5 Eng. Rul. Cas. 261.

"Expressing the same rule in a somewhat different way, it may be said that the duty of a carrier is confined to accepting and carrying property of a kind that he undertakes or is accustomed to and can safely and conveniently carry.

"Pfister v. Central P. R. Co. 70 Cal. 169, 11 P. 686, 59 Am. Rep. 404;

Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044."

Appellant's second contention is hardly more tenable.

It is true that Section 206(a) does not include any reference to the word "commodities," but this section must be read in harmony with other provisions of the act.[16]

Section 206(a)[17] provides:

> "... no common carrier by motor vehicle subject to ... this part shall engage in any interstate ... operation ... provided, however, that ... if any such carrier ..."

The words "such carrier" found in the proviso, refers back to the words "common carrier."

A "common carrier by motor vehicle" is defined in this act in Section 203(a) paragraph 14[18] as "any person

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[16] "As the act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." McDonald vs. Thompson, 305 U. S. 263, 266.

[17] Section 206(a) reproduced in full in Appendix, page 30.

[18] This paragraph of Section 203(a) is reproduced in full in the Appendix, page 29.

who . . . undertakes . . . to transport . . . property, *or any class or classes* of property, for the general public . . . over regular or *irregular routes* . . ." (Italics ours.)

The words "class or classes of property" certainly refer to "commodities."

The Commission, from the beginning of its administration of the act, has so construed Sections 203(a) and 206(a), as authorizing it to limit operating authority granted common carrier applicants under the "grandfather" clause, to the moving of the particular commodities it transported between specific points. This policy has been defined by the Commission,[10] as follows:

> "Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

[10] Powell Bros. Truck Lines, Inc., supra (decided Oct. 8, 1938).

This policy has been pursued by the Commission over a long period of years.[20]

The Commission has also applied this same rule in granting authority to regular route common carriers.[20A]

This policy of administration, like that affecting territorial awards, has both judicial and legislative sanction.

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[20] Jersey Coast Transfer Co., 9 M.C.C., 780, 782 (decided Oct. 8, 1938), where the Commission said:

"It apparently has attempted to obtain only a few commodities for transportation and has actually served only a comparatively small number of shippers or consignees of freight. Clearly, applicant's principal truckload operation was the transportation of coal, petroleum products, clothing and dry goods, and household goods and furniture, such other transportation as it furnished being merely incidentally thereto. To hold on this showing that applicant should be authorized to transport general commodities, manifestly would be unfair to competitors entitled to such authorization under the 'grandfather' clause, established by an actual showing of operation upon a broad scope and a holding out to transport and the transportation of all commodities offered. Under section 206 of the act, an applicant is entitled to a certificate authorizing the continuance only of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since. To authorize applicant to transport a larger number of commodities than it has ever transported or held itself out to transport, on or prior to June 1, 1935, would amount, not to an authorization of the continuance of such operation as it was engaged in on that date, but to an authorization of an extension of the scope of its operation both as to the commodities transported and the territorial extent of such operation."

Chautauqua Stor. & Transfer Co. Appl., 14 M.C.C., 227, 230, where the Commission said:

"Although applicant seeks authority to transport general commodities from Jamestown to the described territory in New York and Pennsylvania, the evidence does not indicate that applicant held itself out to transport or ever did transport a sufficient variety of commodities to warrant the granting of such broad authority. Under section 206 of the act an applicant is entitled to a certificate authorizing the continuance of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since."

[20A] Ferrell Common Carrier Application, 16 M.C.C., 93, 95 (decided March 6, 1939), the Commission said:

"Although applicants seek authority to transport general commodities, the evidence does not show that they held themselves out to transport or ever did transport a sufficient variety of commodities as would warrant the granting of such broad authority. Under section 206 of the act an applicant is entitled to a certificate authorizing the continuance only of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since."

In Loving vs. United States, supra, this identical question was before the court.

The carrier there contended that they were entitled to a certificate authorizing the transportation of all commodities between all points within the territory claimed, rather than the certificate granted by the Commission which specified particular commodities between designated points.

These contentions were based upon their claim of "holding out to the public" "within all territories which he assumed to serve" coupled with their assertion they could have been "compelled to serve."

The District Court in disposing of these contentions said:

> "We cannot agree with plaintiffs that for the purpose of construing the Act involved, the actual status of a common carrier arises in accordance with his public offer and begins immediately when such a carrier accepts any shipment within the scope of his public offer. The cases relied upon, to the effect that if a carrier hold himself out to the public to carry for hire he is a common carrier, and must fulfill his obligation to the public as such, are not controlling in construing the instant Congressional Act. It is further insisted by plaintiffs that to limit the present 'grandfather' rights of a common carrier to the specific commodities each has carried on and prior to June 1, 1935, and to operations only between the specific localities each has continuously served, where in such instance the undertaking has been more general, would interfere with the public's right to continue to be served by common carrier until new and further proof of public convenience

and necessity is shown. The purpose of the Act is regulatory, and we believe that the 'grandfather' clause was included therein for the benefit of carriers who had been in bona fide operation on and prior to the 'grandfather' date, rather than for the serving of public convenience. Adequate provision was contained in the Act for the granting of certificates upon proper showing that there is public necessity for such service.[21] We, therefore, cannot accept such reasoning of plaintiffs for a strained construction of the Act."

In Eastern Carrier Corp. vs. United States, supra, the District Court's opinion indicates that the Commission has issued the carrier a certificate, which authorized the transportation of general commodities over several routes, and had limited the carrier's operation to silk and rayon between certain termini, and hosiery from Washington to Philadelphia. The Carrier contended that such limitation of cargo was not authorized by the Act.

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[21] This appellant has availed itself of these provisions of the Act by filing an application, docked by the Interstate Commerce Commission as MC-42318, Sub-No. 1. The Commission's report and order is not printed, but in this application the appellant sought to take advantage of another exception to Section 206(a) by claiming the coverage of Section 206(b) ("Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate . . . commerce as a common carrier . . . when this section takes effect [effective date of Section 206 was October 15, 1935] may continue such operation for a period of one hundred and twenty days thereafter . . . if application for such certificate is made . . . within such period, the carrier may, . . . continue such operation until otherwise ordered . . ."). Appellant sought the right to transport "general commodities" "between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in Georgia, Louisiana, Mississipni, North Carolina, South Carolina, Virginia, District of Columbia, those in Florida, north of Tampa and Lakeland, etc." (R. 35, 36.) In disposing of this application, the Commission issued a certificate authorizing the transportation of "marble" from Gantts Quarry, Alabama, to all points in the States of North Carolina, South Carolina, New Jersey, Virginia, Florida, Pennsylvania, New York, Maryland, Delaware, and District of Columbia, and ordered appellant to cease and desist from all other operations instituted between June 1, 1935, and October 15, 1935. (R. 25-43.)

The District Court in disposing of this contention, said:

"We entertain no doubt that the Commission under the Act has the power to restrict the plaintiff to the type of service it was performing on June 1, 1935, not only as to the routes operated but also as to the class of commodities which it carried. While the Act does not confer such power in express terms we think that the existence of such a power is implicit in its provisions. A 'common carrier by motor vehicle' is defined by the Act, Section 203(a) 14) (49 U.S.C.A. 303(a) 14) as 'any person who or which undertakes . . . to transport passengers or property, or any class or classes of property for the general public . . .' Section 208(a) (49 U.S.C.A. 308(a)) provides that 'any certificate issued under Section 206 or 207 shall specify the service to be rendered . . .'

"In *United States v. Maher, supra,* the Supreme Court stated, p. 155, by Mr. Justice Frankfurter, 'The recognized practices of an industry give life to the dead words of a statute dealing with it.' By the enactment of the Motor Carrier Act Congress intended to regulate the motor carrier industry. Those who drafted the Act were well aware that carriers by motor vehicle were specializing in the transportation of particular commodities. It was obviously the intention of Congress by the enactment of the grandfather clause to preserve to the carrier its right to transport commodities or articles in commerce of the kind which it was transporting on June 1, 1935. If the plaintiff's predecessor was engaged in the bona fide transportation of merchandise generally at the grandfather date and this transportation was carried on by the plaintiff thereafter, a certificate of public convenience and necessity to continue that transportation should have been granted by the Commission. If the plaintiff and its predecessor was not so engaged in transportation,

the Commission committed no error in denying the application."[22]

As we stated before, the record does not include a transcript of the evidence or exhibits introduced in the hearing before the Commission, and we can only refer to the report of the Commission (R. 8-14) for the facts of actual operations conducted during the "immunizing" period prior to June 1, 1935. During the 17 month period from January 1, 1934, to June 1, 1935 (R. 9), there is nothing to indicate the handling of any commodity other than paper and paper products from Birmingham to New Orleans, Chattanooga and Knoxville, and from Kingsport to Birmingham: other than nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham: other than cloth from Alabama City, Alabama, to Wheeling, West Virginia: and other than matches from Wheeling, W. Va., to Chattanooga and Birmingham.

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[22] State courts have always so interpreted similar statutes, one of late cases (1941), is that of Gulf, Mobile & Ohio Ry. Co. vs. Luter Motor Express, Inc., 1 So. (2) 231, in which case the opinion of the Supreme Court of Mississippi, stated:

"One who was operating on the date aforesaid as a restricted carrier cannot avail of the grandfather proviso to obtain a certificate of convenience and necessity as a general common carrier. Here the record shows that what appellee had carried had been fresh cream, oil, and other petroleum products, and that such other things as were carried were merely casual, and were of comparatively rare occurrence. These sporadic or occasional incidents cannot be enlarged into the creation of a right to be certified, under the grandfather clause, as a common carrier of everything which may be transported by motor vehicle, as the order of the Commission attempted to do in this case."

"Nor does the fact that the carrier held himself out as ready, able and willing to carry any and everything for any and everybody change the legal situation so far as the grandfather proviso is concerned. What was actually and ordinarily done on and before the date mentioned is the test, and the burden of proof in such matters rests on the applicant; and, as already stated, that proof must be definite and well sustained, whence it follows that statements by a witness or witnesses which are phrased in terms of generalities are not sufficient."

It was not unusual for motor carriers, prior to the advent of Federal Legislation, to pick and choose their traffic and to confine that traffic to transportation between such terminii as it desired to operate. Obviously, traffic other than "cloth" was available at Alabama City, Alabama, and certainly "cloth" was shipped from that point to destinations other than Wheeling, West Virginia.

Appellant's actual operations, as found by the Commission, and its "holding out" to the public, were between the points for the particular "class" of traffic which it actually handled, consistent with such "holding out." There is no more reason to grant the right to transport all classes of commodities to appellant between these points than it would be to grant the right to handle general commodities to an automobile transporter within the territory it had delivered automobiles. As general commodities did move to or from almost any conceivable point, some carrier must have transported such commodities and it was a part of this plan of regulation to give to each carrier the right to continue to do exactly what it was doing on the "critical" date, thus protecting each carrier in its own right, and thereby furthering the policy set forth in Section 202(a) of the Act.[23]

[23] Section 202(a) reproduced in full in the Appendix, page 29. See opinion in Loving vs. United States, Eastern Carrier Corp. vs. United States, supra, and United States vs. Maher, 307 U. S. 148.

This policy[24] of limiting operations to the commodities actually and consistently transported, has likewise received legislative approval, in that Section 203(a) has been amended three times,[25] and Section 206(a) has been twice amended[26] by Congress since this policy was first announced, and it may now be said, in the words of this court, to have now received congressional "adoption."[27]

In the same way the construction and interpretation of these sections announced by the Commission under the act and its continued administration in accordance therewith may be said to be now controlling unless clearly inconsistent with the language of the act.[28]

The order of the Commission in this case should be regarded as one in accordance with its early announced policies, based upon a proper finding of facts,[29] and as such there can not be urged a lack of "basic prerequisites of proof."[29]

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[24] Dakota Trans. Inc. Common Carrier Application, 3 M.C.C., 621, 624, decided December 2, 1937, where the Commission said:

"It is argued that the act does not require that the certificate specify the commodities to be transported, and that an applicant's authority need not be confined to any special commodities even though its transportation happened to be so limited as of June 1, 1935. Section 203(a) (14) of the act clearly contemplates that a person may be a common carrier of a "class or classes of property." Applicant so limited its undertaking in its operations eastbound to Chicago over route 1, and the authority to be granted herein must be limited accordingly.

[25] June 23, 1938 (52 Stat. 1029), June 29, 1938 (52 Stat. 1236), and September 18, 1940 (54 Stat. 920). In the definition of a "common carrier" contained in amendment of September, 1940, paragraph 14 of this section, was rewritten, but the phrase "property or any class or classes thereof" was reenacted.

[26] June 29, 1938 (52 Stat. 1238) and September 18, 1940 (54 Stat. 923).

[27] See cases cited, page 15, this brief.

[28] Schell's Extension vs. Fauche, supra, and other cases cited, page 14, this brief.

[29] We do not understand that appellant questions the correctness of facts found by the Commission.

This court[30] has heretofore recognized the possibility of disputed questions arising under orders issued by the Commission on "grandfather clause" applications, and it has wisely determined to let the Commission, charged by Congress with the administration of the act, formulate the policies under which that administration is to be carried out.[31]

Literally thousands of applications have been decided under these policies and if the trucking industry itself had felt that they were unfair or burdensome, its voice would have been heard in Congress, and appropriate relief would have been sought. The Motor Carrier Act has been thrice amended but its provisions pertaining to these questions have been left substantially unchanged.

CONCLUSION.

It is respectfully submitted, for the reasons stated, that the decree of the District Court should be affirmed.

JAMES W. WRAPE,
Attorney for
Regular Common Carrier Conference,
of the
American Trucking Association, Inc.

January, 1942.

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[30] Rochester Telephone Corp. vs. United States, 307 U. S. 125, 140.

[31] By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfies the dictates of fairness by affording sanction to enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." United States vs. Maher, supra.

APPENDIX

Statutes Involved

The pertinent provisions of the Motor Carrier Act, 1935, applicable at the date of the Commission's order, July 10, 1940 (c. 498, 49 Stat. 543; c. 811, 52 Stat. 1236), are as follows:

Sec. 202 (U. S. Code, Sup. V, title 49, sec. 302). (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Sec. 203. (U. S. Code, Sup. V, title 49, sec. 303.) (a) As used in this part—

* * * * * *

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for com-

pensation, whether over regular or irregular routes, including such motor-vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Sec. 206. (U. S. Code, Sup. V, title 49, sec. 306). (a) Except as otherwise provided in this section and section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission, authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be

decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. (U. S. Code, Sup. V, title 49, sec. 307.) (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit,

willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Sec. 208. (U. S. Code, Sup. V, title 49, sec. 308.) (a) Any cerificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1941.

Howard Hall Company, Inc., Appellant, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Alabama.

[March 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, like *United States* v. *Carolina Freight Carriers Corp.*, decided this day, is an appeal from a district court of three judges (38 F. Supp. 556) convened to review an order of the Interstate Commerce Commission (24 M. C. C. 273) granting appellant a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206(a)) of the Motor Carrier Act of 1935. 49 U. S. C. § 306.

Appellant made application as a common carrier of general commodities operating over irregular routes. It sought authority to operate between all points in a vast territory comprising most of the country east of the Mississippi River except the New England states. The Commission authorized the issuance of a certificate but limited it in two respects. (1) It restricted the geographical scope of the operations by authorizing service only from Birmingham, Ala., and all points within a radius of 10 miles from that city, to all points in certain states and to designated points in others. (2) Though it permitted appellant to carry general commodities throughout a large segment of the authorized territory, it limited the kinds of commodities which could be carried between specified points. Its finding containing those restrictions (24 M. C. C., p. 277) reads as follows:

"We find that applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection

with so-called household movings between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, and South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne, of paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham, of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham, of cloth from Alabama City, Ala., to Wheeling, W. Va., and of matches from Wheeling to Chattanooga and Birmingham, all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied."

The District Court refused to enjoin enforcement of the order and dismissed the complaint. The errors urged here do not relate to the substantiality of the evidence in support of the findings. They involve two questions: whether the Commission was warranted in limiting shipments to and from points located within a 10 mile, rather than a 100 mile, radius of Birmingham; and (2) whether the Commission erred in limiting the operating rights of appellant to the transportation of only a few commodities between certain points.

I. We perceive no error in the limitation which the Commission made on the territorial scope of appellant's operations.

Appellant argues that if it may be authorized to serve all points in one state, say Georgia, without showing that every point in Georgia had been previously served by it, then it must be granted like authority as respects the 100 mile radius around Birmingham. That is a *non sequitur*. Prior operations to several points in a region may or may not justify the Commission in authorizing service throughout the whole region. The precise geographical pattern for future operations is the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service, and the like. *Alton R. R. Co.* v. *United States*, 314 U. S. —; *United States* v. *Carolina Freight Carriers Corp., supra*. The Commission employed those standards in limiting the territorial scope of appellant's operations. We cannot say that its reduction of the Birmingham area from a radius of 100 miles to a radius of 10 miles was unjustified. The Commission found that only 55 shipments were transported prior to June 1, 1935, to or from points within

100 miles of Birmingham, as against 875 to or from that city. Only 12 points were served in that large area. After June 1, 1935, 270 shipments moved to or from points within 100 miles of Birmingham as against 2,030 to or from that city. The Commission reduced the radius to 10 miles in an endeavor to include only the important industrial area surrounding that city. If we were to enlarge that area, we would clearly usurp a function which Congress entrusted to the Commission. Nor can that finding be assailed because permission to serve all points in other areas was allowed. Such a difference in treatment plainly is not erroneous as a matter of law. And nothing has been called to our attention which would even suggest that the record of prior operations or the characteristics of this transportation enterprise precluded the Commission from restricting the territory where shipments mainly originate while being more liberal as respects the territory where destination points are located.

II. We take a different view as respects the limitation on commodities which the Commission imposed in case of shipments between specified points. We do not say that that limitation was unjustified. We merely hold that in this case, as in *United States* v. *Carolina Freight Carriers Corp., supra,* the basic or essential findings to support that part of the order are lacking. The Commission's conclusion that appellant was authorized to transport general commodities between Birmingham and vicinity on the one hand and all points in designated areas on the other was based on its finding that prior to and since June 1, 1935, appellant "held itself out to transport general commodities" in that territory and "actually conducted an operation consistent with such holding out." But in case of the limitation which it imposed on the shipment of certain commodities it merely found that "prior to and since June 1, 1935, applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tennessee, and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va., and matches from Wheeling to Chattanooga and Birmingham."

As we indicated in *United States* v. *Carolina Freight Carriers Corp., supra,* if the applicant had established that it was a "common carrier" of general commodities during the critical periods in a

specified territory, restrictions on commodities which could be moved between specified points in that territory would not be justified. The mere fact that particular commodities had never been transported between designated points in that territory would not mean that authority to haul them between such points should be withheld. On the other hand, an applicant's status may vary from one part of the territory to another. As respects carriage between designated points, the applicant may have restricted its undertaking to particular commodities. It is not clear, however, that the Commission applied those tests in this case. From all that appears it may have allowed only paper and paper products to be shipped from Birmingham to New Orleans merely because paper and paper products were the only commodities previously carried between those cities. It is true that the Commission quoted from *Reliance Trucking Co., Inc.*, 4 M. C. C. 594, 595, to the effect that the question is whether there has been an operation within the critical periods consistent with the holding out in the natural and normal course of business, and that a mere holding out without evidence of an operation consistent therewith is not enough. Yet it also seems to have placed considerable reliance on *Powell Brothers Truck Lines, Inc.*, 9 M. C. C. 785, 791-792, which we have discussed in *United States* v. *Carolina Freight Carriers Corp., supra*, and which apparently treats irregular route carriers differently in this regard than regular route carriers. Since the influence of that view seems to have permeated the findings, we conclude that here, as in *United States* v. *Carolina Freight Carriers Corp., supra*, the case should be remanded to the Commission so that the basic or essential findings required under the rule of *Florida* v. *United States*, 282 U. S. 194, 215, may be made.

It is so ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON dissent for the reasons stated in their dissenting opinion in *United States* v. *Carolina Freight Carriers Corp.*, No. 197 decided this day.